

1 Frank Lewis (State Bar number 000909)
2 BEGAM, LEWIS & MARKS, P. A.
3 111 West Monroe Street, Suite 1400
4 Phoenix, Arizona 85003-1787
5 (602) 254-6071

6 Attorneys for State Bar of Arizona Senior Lawyer's Division and
7 individuals whose names and State Bar numbers are set forth in the
8 appendix attached hereto

9 **BEFORE THE ARIZONA SUPREME COURT**

10
11 In the Matter of a PETITION TO
12 AMEND SUPREME COURT RULES 32,
13 45 AND 64.

NO. R-07-0030
COMMENTS OF STATE BAR SENIOR
LAWYER'S DIVISION AND THE
ATTORNEYS LISTED IN ATTACHED
APPENDIX IN OPPOSITION TO
THE PETITION TO AMEND
SUPREME COURT RULE 45

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20 The State Bar Senior Lawyer's Division and the individual
21 attorneys listed in the appendix (hereafter, "Opponents") hereby
22 express their opposition to the Petition of the State Bar of
23 Arizona to remove the age based exemption from Mandatory Continu-
24 ing Legal Education in Rule 45, and to require active members who
25 have attained the age of 70 to complete ten hours of MCLE each
26 educational year. The State Bar presents no factual basis that
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1 requires the change it seeks in a rule that has contained an age
2 based exemption since the time it was enacted almost 20 years ago.

3 DISCUSSION

4 This is the second time the State Bar has filed a petition
5 to remove the age based MCLE exemption. (see -05-0034). That
6 petition was withdrawn as a result of a near unanimous vote of the
7 Board of Governors at its June, 2006 Annual Convention Meeting.
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9 Undersigned counsel filed an opposition to that petition on
10 behalf of the Senior Lawyers Division and enumerated individuals
11 in which the following was set forth:
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13 "the board proposes to eliminate the age based
14 exemption from Mandatory Continuing Education found in
15 Supreme Court Rule 45 (b)3 because, as stated in the
16 Petition
17

18 "MCLE helps to insure that members stay on top of
19 recent changes in the law, to prevent our members
20 from entering the lawyer regulation system, and to
21 further the Bar's long-term goal of providing the
22 best legal services to our citizens as is possible.
23 MCLE requirements provide public protection and
24 should be in place for all active practitioners,
25 regardless of age".

26 "implying, without any supporting data, that the age
27 based exemption from MCLE causes members over 70 to
28 enter the lawyer regulation system in a manner that
could be avoided if the exemption were removed (see

1 Lewis affd ¶ 8). No data supporting the need for the
2 elimination of the age based MCLE exemption was provided
3 to the Board prior to the petition being filed (or at
4 any time thereafter as far as Opponents know) and when
5 undersigned counsel, on behalf of Opponents requested
6 the supporting data from the Board the response was that
7 none existed and, in any event it was irrelevant (see
8 Lewis affd ¶ 8)." (opposition pages 2-3)

9 The opposition continued, as follows:

10 **" Comments concerning the age based MCLE exemption**

11
12 Supreme Rule 45 was adopted in 1989 and contained an
13 age based exemption (at the time 75). In 2000 the Board
14 submitted an omnibus petition to the Court including an
15 amendment to Rule 45(b) (3) lowering the age exemption to
16 70. It appears that the Court adopted this part of the
17 proposed rule change without revision and without
18 receiving any comment pro or con.

19
20 Now, without any supporting data, the Board asks to
21 have the age based MCLE exemption removed. The petition
22 in this regard erroneously implies that there is data
23 demonstrating that those benefiting from the exemption
24 are entering the lawyer regulation system and not
25 providing legally adequate services to their clients.
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1 Since the Board regulates and administers MCLE (Supreme
2 Court Rule 45 (g)) when it petitions the Court using the
3 language that it does at page 2 lines 21 to 26 of the
4 petition, it certainly is implying that it has data to
5 back up the request. It does not. When the data was
6 asked for it was not provided. Then, even more surpris-
7 ingly, the response of the President of the State Bar to
8 requests from Opponents for data supporting this part of
9 the petition, was that the data was irrelevant (Lewis
10 Affd 8). Seniors may enter the lawyer regulatory system
11 for reasons that have nothing to do with MCLE and would
12 not be affected by MCLE. (e.g. memory problems, substance
13 abuse problems, failing to send clients their files when
14 closing an office, etc). Opponents wished to have this
15 information in order to construct a meaningful opposi-
16 tion comment. Opponents believe that the Court would be
17 interested in this data when asked to change a Rule that
18 it had adopted and then lowered the exemption age a
19 short time ago at the request of the then reigning
20 Board. The Court stated it must ensure "that those
21 competent when admitted to practice retain that
22 competency while continuing in practice" through MCLE,
23 in the *Matter of Smith* 189 Ariz. 144,149(1997). At the

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1 time the Court had already put in place the age based
2 exemption, putting to rest any argument that **every**
3 practicing lawyer must have MCLE." (opposition pages
4 11-13").

5
6 The rationale provided by the State Bar to the Court
7 in the present petition is stated at page 7 of the petition;
8 "The proposed rule would help ensure that active members over
9 the age of 70 will maintain a minimum level of competence in
10 the law". As was stated in opposition to the 2005 petition,
11 since the Board regulates and administers MCLE (Supreme Court
12 Rule 45 (g)) and the attorney disciplinary process, when it
13 petitions the Court using the language that it does at page 7
14 (quoted above) it certainly is implying that it has data to
15 back up the request. It does not.
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18 As was the case with the 2005 petition no supporting
19 data had been supplied to the members of the Board of
20 Governors for the proposition that requiring over 70s to take
21 MCLE would have an impact on their competence. See the e-mail
22 exchange between undersigned counsel and the State Bar
23 president, Dan McAuliffe, attached as exhibit A to this
24 document.
25

26 As was noted in the 2005 opposition, since the State
27 Bar handles the attorney regulatory process, when it says to
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1 the Court that the proposed change "would help ensure that
2 active members over the age of 70 will maintain a minimum
3 level of competence in the law" it is certainly implying that
4 it has the data to support this rationale, when in fact none
5 exists nor was any such data presented to the Board of
6 Governors when it voted on the proposed change.

8 The Court should not abandon the Rule 45 age based
9 exemption it created based on the state of the record as it
10 now exists; A request without any valid reason being given.

12 Respectfully submitted this 19th day of May, 2008

13 BEGAM, LEWIS & MARKS, P. A.

14 By Frank Lewis

15 Frank Lewis
16 111 West Monroe Street, Suite 1400
17 Phoenix, Arizona 85003-1787
(602) 254-6071
Attorneys for Opponents

18 Copy of the foregoing
19 Mailed this 19th May, 2008
20 To: Robert B. Van Wyck
Chief Bar Counsel
Frank Lewis
21 Frank Lewis

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APPENDIX

INDIVIDUAL ATTORNEYS JOINING IN THE COMMENTS

AND

DECLARATION OF FRANK LEWIS

NAMES AND BAR NUMBERS OF INDIVIDUAL ATTORNEYS JOINING IN
THE COMMENTS

| NAME | BAR NUMBER |
|--------------------------|------------|
| Pauline Sherry Fleminger | 009955 |
| James E. Hunter | 000571 |
| Richard J. Waters | 002839 |
| Charles Crehore | 000568 |
| Lawernce Turoff | 001451 |
| D.W. Grainger | 001142 |
| Alena Cantor | 000642 |
| Robert Pickrell | 000480 |
| John M.Tomanek | 001609 |
| William K. Strong | 001235 |
| William C. Penn | 000707 |
| George R. Sorenson | 001096 |
| H. Eldon Hanson | 001406 |
| Herbert S. Fibel | 002576 |
| Anthony E. DePrima | 001983 |
| Robert G. Begam | 000835 |
| Frank Lewis | 000909 |
| Stanford E.Lerch | 001287 |
| Willia F. Behrens | 001575 |
| Irwin L. Bernstein | 001576 |
| Elizabeth Stover | 000735 |
| John S. Schaper | 001148 |
| Robert W. Browder | 000981 |
| Kenneth L. Abrams | 000834 |
| Dale E. Marenda | 000618 |

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1 comments in opposition to the petition of the State
2 Bar of Arizona to amend Supreme Court Rule 45 by
3 Eliminating the age based exemption from Mandatory
4 Continuing Education.
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6 3.The attached Exhibit A is a true and correct copy of
7 e-mail correspondence between the undersigned and Dan
8 McAullife, president of the State Bar of Ariizona.
9

10 Dated this 19th day of May, 2008

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12 Frank Lewis
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25 **LEWIS &**
26 **MARKS**

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28 ASSOCIATION OF
LAWYERS

From: franklewis@aol.com
To: dmcauliffe@swlaw.com
Subject: Re: Seniors Issue
Date: Mon, 15 Oct 2007 10:09 am

Dan

Thank yo for the information. How would I go about finding out what services are provided to seniors by the bar and the cost of those services. For instance, I did not get a free copy of the new bar directory -- it had to be paid for. But I do get Arizona Attorney. What other services are provided is my question and what is the cost (including Arizona Attorney)

I appreciate your problem in assigning time to those not members of the board. I hope you will keep in mind that I am the spokesperson for the Senior lawyers group. I would hope you would see fit to award me more than a pro rata share of the time for all individuals who have asked for time.

Frank

-----Original Message-----

From: McAuliffe, Dan <dmcauliffe@swlaw.com>
To: franklewis@aol.com
Cc: Teresa.Schmid@staff.azbar.org; nedra.brown@staff.azbar.org
Sent: Fri, 12 Oct 2007 7:34 pm
Subject: Seniors Issue

Frank:

Nedra Brown passed along to me your request that you receive copies of the materials the Board of Governors will have before them when they consider what I have been calling the "seniors issue." The Board will have my set of Initial Proposals, and Dick Coffinger's suggested alternative, both of which I believe you already have. The Board will also have two spreadsheets prepared by Staff which show the current age distribution of the membership, and projections concerning the number of active members likely to turn 70 in the next several years. I have attached copies of both of them.

The only other materials the Board will consider are copies of e-mails and/or letters received from members stating their positions on the proposals to be considered. I am not comfortable sharing them with you, because members were not told that their communications to the Board would be distributed publicly.

Finally, I hope you appreciate that there will probably be a time limit on oral presentations to the Board. Scope and Operations has set a limit of an hour and a half for discussion of this issue at the October meeting, and wants at least 50 minutes of that to be for the Board to discuss what is before them. My intention is to divide the remaining time equally between all those who indicate they wish to speak at the meeting.

Call me if you have any questions.

EXHIBIT A

Dan

Email and AIM finally together. You've gotta check out free AOL Mail! - <http://mail.aol.com>